Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	
	)	CC Docket No. 95-116
CTIA Request for Declaratory Ruling on	)	
Wireline-Wireless Porting Issues	)	

OPPOSITION TO JOINT PETITION FOR STAY

Laura H. Phillips
Laura S. Gallagher
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209

Its Attorneys

Kent Nakamura
Vice President, Deputy General Counsel -- Regulatory
Robert McNamara
Senior Counsel – Regulatory
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

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Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits this Opposition to the Joint Petition for Stay Pending Judicial Review filed by the United States Telecom Association, CenturyTel, Inc. and CenturyTel of Colorado, Inc. (collectively "Petitioners").[1] For the reasons set forth below, the Federal Communications Commission ("Commission") should deny the stay request and re-affirm that all incumbent local exchange carriers ("ILECs") have an obligation to port telephone numbers to wireless carriers.

I. INTRODUCTION AND SUMMARY.

Nextel is one of several Commercial Mobile Radio Service ("CMRS") providers that, through subsidiaries, offers a range of valuable digital wireless services in its licensed markets nationwide. Under the terms of orders and rules, Nextel and other CMRS carriers are required to allow customers to port their numbers out and accept new customers with numbers to be ported in beginning November 24, 2003. This number porting requirement originally was established by the

[1] Joint Petition for Stay Pending Judicial Review, CC Docket No. 95-116 (filed November 18, 2003) ("Petition").

Commission in 1996[2] and Nextel has been preparing its network, systems and personnel to comply with the Commission's porting rules for the past several years.

In its *Intermodal Porting Order*, the Commission appropriately and concisely determined that ILECs, like other carriers, have a preexisting obligation to port numbers.[3] The Commission's rules and policies make no distinction between the porting of numbers among wireless carriers and the porting of numbers between a wireless carrier and an ILEC. Nextel and other wireless carriers have proceeded to implement LNP with both wireless and wireline carriers through the Commission's *bona fide* request process. While USTA's members and CenturyTel may disagree with the Commission's fundamental policy approach to intermodal porting, their Petition fails to support their assertion that the Commission acted improperly in reaching its conclusions or that the *Intermodal Porting Order*, will, in fact, be reversed on appeal.

As a legal matter, the Petition fails to satisfy the criteria for a stay.[4] The Petitioners are unlikely to succeed on the merits of their claims, as they rest entirely upon the faulty suggestion that the *Intermodal Porting Order* adopted a new rule or created a new "location portability" obligation on ILECs. As the Petition itself recites, the Commission recently clarified that number porting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number *is not location portability because the rating of calls to*

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[2] Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 155 (1996) ("*LNP First Report and Order*").

[3] Telephone Number Portability – CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 95-116, FCC 03-284, ¶ 28 (rel. November 10, 2003) ("*Intermodal Porting Order*").

[4] The Commission evaluates stay requests under the criteria set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*. Under the *Virginia Petroleum Jobbers* test, as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm, absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay. *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Holiday Tours*").

the ported number remains the same. Nor does the *Intermodal Porting Order* put incumbent wireline carriers at a competitive disadvantage. What the order does is advance the Commission's long stated objective to create an environment where wireless carriers may compete with ILECs for voice service customers. Claims by Petitioners that they are now at a competitive disadvantage and will be "harmed" by the pre-existing LNP rules are plainly absurd.[5] And any notion that they could somehow be surprised by the Commission's clarification of their porting obligations rings hollow. Similarly, assertions that the Commission improperly modified a rule without notice similarly are inaccurate.

As a policy matter, any stay of wireline-to-wireless porting obligations would throw into disarray the efforts undertaken by CMRS carriers (as well as some ILECs) to implement intermodal local number portability by November 24, 2003. All local exchange carriers have been on notice since 1996 that full intermodal number portability was required.[6] And the public interest requires that the wireline carriers that have received timely *bona fide* requests for portability go forward with LNP on November 24. The Petition is little more than an unfounded effort to persuade the Commission to retreat from its pro-competitive decision. Such dilatory tactics by ILECs and their trade association will disserve consumers – who expect on November 24, 2003, to be able to port their telephone numbers from landline to wireless carriers in the top 100 MSAs. The Petition must be denied.

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[5] Indeed, in the recent *Triennial Review Order*, the Commission confirmed that CMRS is not yet a true substitute for landline service: "we note that CMRS does not yet equal traditional incumbent LEC services in its quality, its ability to handle data traffic, its ubiquity, and its ability to provide broadband services to the mass market." *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 01-338; CC Docket No. 96-98; CC Docket No. 98-147, FCC 03-36, fn. 1549 (rel. August 21, 2003).

[6] The implementation timetable was finalized in July of 2002 when the Commission established that CMRS carriers would offer number portability in the top 100 MSAs by November 24, 2003. Verizon Wireless's Petition for Partial

II. THE PETITION WILL NOT SUCCEED ON THE MERITS.

The Petitioners claim that they will succeed on the merits because the *Intermodal Porting Order* somehow "embodies a new rule,"[7] and fails to satisfy the notice and comment requirements of the Administrative Procedure Act ("APA").[8] Both of these arguments are the same hollow ones that ILEC raised before and were rejected squarely and on the merits by the Commission.

For one, contrary to the Petitioners' claim, the Commission is ***not*** requiring location portability by enforcing the intermodal porting obligation. The Commission already made this plain.[9] Location portability, unlike service provider portability, involves the re-association, or re-rating, of a telephone number from the original rate center to another rate center. As there is no need for any re-association or re-rating of a telephone number that ports – because it remains associated with its original rate center – there is no change in the number's location.

Second, the Commission has not violated any "industry-collaborative" process by affirming the intermodal LNP obligation.[10] No new obligations have been imposed on Petitioners, who have been on notice of their regulatory obligation to port numbers for years. Petitioners, aggrieved that the Commission rejected the APA notice arguments interposed by other ILECs seeking to avoid full intermodal portability, argue that the Commission simply was wrong. Interestingly, the Petitioners nowhere acknowledge the Commission's analysis in the *Intermodal Porting Order* that Section

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Forbearance from the Commercial Mobile Radio Services Number Portability Obligation And Telephone Number Portability, *Memorandum Opinion and Order*, 17 FCC Rcd 14972 (2002).

[7] Petition at 7.

[8] *Id.* at 12.

[9] Indeed, according to the Commission, "porting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number does not, in and of itself, constitute location portability, because the rating of calls to the ported number stays the same." *Intermodal Porting Order* at ¶ 28. As the expert agency, the Commission is entitled to *Chevron* deference when determining what constitutes location portability. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[10] Petition at 8.

251(b)'s own requirements and the ILEC industry's long-standing knowledge of the impending intermodal porting requirement provide more than an adequate basis upon which to clarify the scope of these obligations.[11]

Third, despite the Petitioners' claims to the contrary, the intermodal porting clarification is not inconsistent with any other LNP rules. According to Petitioners, "in the absence of *any* requirement that wireline carriers port numbers to a requesting carrier that had no facilities or numbering resources in the rate center, the Commission could establish that requirement only by adopting a new rule, not by interpreting any existing obligation."[12] This argument misses the mark, as the Commission already has adopted a North American Numbering Council guideline that limits the porting obligation "to carriers with facilities or numbering resources in the same rate center." While the Petitioners may have hoped or anticipated that "facilities" in this context might be narrowed to mean a point of interconnection in every ILEC rate center, the Commission instead clarified that CMRS carriers have facilities in the "same rate center" if they provide service coverage in the ILEC rate center. The wireless service coverage by radio waves are actual wireless company facilities and the Commission's determination in this regard was entirely reasonable. The Commission acted appropriately and with notice in interpreting the rule to require ILECs to port to CMRS carriers where the requesting CMRS carrier's coverage area "overlaps the geographic location of the rate center in which the customer's wireline number is provisioned, provided that the porting-in carrier maintains the number's original rate center designation following the port ."[13]

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[11] *Id.*

[12] *Id.* at 9.

[13] *Intermodal Porting Order* at ¶ 22.

This view is consistent with the ILECs' obligations to port to other wireline carriers, as well as their "broad porting obligations" under Section 251(b).[14]

Fourth, the Petitioners make an absurd contention that the *Intermodal Porting Order* places ILECs at a competitive disadvantage in the marketplace.[15] According to the Petitioners, the Commission has established a "bedrock principle" that numbering administration not unduly favor or disfavor a particular industry segment or technology.[16] This assertion is not terribly meaningful in the abstract. Fundamentally, CMRS carriers have never been on equal footing with ILECs – they do not maintain a fiercely dominant, near monopolistic stronghold over local markets. Wireless carriers cannot file tariffs, nor generate guaranteed rates of return for their shareholders. Fundamentally, as the Commission recognized in the *Intermodal Porting Order* when it rejected this "discrimination" argument, there is no way to completely ignore the technical, regulatory and historic differences between the local landline and the wireless industries. Instead, the Commission stated that the "focus of the porting rules is on promoting competition, rather than protecting individual competitors. To the extent that wireline carriers may have fewer opportunities to win customers through porting, this disparity results from the wireline network architecture and state regulatory requirements, rather than Commission rules."[17]

Further, the intermodal porting obligation is intended to create a more even playing field so that wireless carriers are better able to compete with ILECs in local markets. In fact, at the time it adopted LNP obligations for wireless carriers many years ago, the Commission cited the potential

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[14] *Id.* at ¶ 21.

[15] Petition at 9-12.

[16] *Id.* at 10.

[17] *Intermodal Porting Order* at ¶ 27. Importantly, the Commission also recognized that the "fact that there may be technical obstacles that could prevent some other types of porting does not justify denying wireline consumers the benefit of being able to port their wireline numbers to wireless carriers. Each type of service offers its own advantages

for intermodal competition as the driving public interest reason for requiring CMRS carriers to implement LNP at all.[18] For USTA and CenturyTel to claim that they are now the victims of regulatory favoritism is ridiculous.

Finally, the Petitioners assert that the *Intermodal Porting Order* violates the APA because the Petitioners were not provided with the opportunity for notice and comment. According to the Petition, "[b]y proceeding without issuing a notice, the Commission severely constrained petitioners in their ability to propose solutions to technical and regulatory barriers to intermodal portability that would have enabled the Commission to proceed in a balanced, nondiscriminatory fashion."[19] This argument fails for numerous reasons. For one, as stated above, the Commission did not adopt any new rule. As the Commission itself states in the *Intermodal Porting Order*:

> the requirement that LECs port numbers to wireless carriers is not a new rule. . . . [S]ection 251(b) of the Act and the Commission's Local Number Portability *First Report and Order* impose broad porting obligations on wireline carriers. Specifically, these authorities require wireline carriers to provide portability to all other telecommunications carriers, including wireless service providers. . . . The clarifications we make in this order interpret wireline carriers' existing obligation to port numbers to wireless carriers. Therefore, these clarifications comply with the requirements of the Administrative Procedure Act as well as the D.C. Circuit's decision in the *Sprint* case.[20]

Petitioners have been on notice of their intermodal porting obligations since 1996, and, while the Commission's clarifications did not please them, they cannot fairly be characterized as new rules adopted without sufficient notice.

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and disadvantages (e.g., wireless service offers mobility and larger calling areas, but also the potential for dropped calls) and wireline customers will consider these attributes in determining whether or not to port their number." *Id.*

[18] *See* Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 160 (1996) ("Number Portability Order") (noting that "service provider portability will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services.").

[19] Petition at 13.

[20] *Intermodal Porting Order* at ¶ 26.

It is plain from the record that USTA and CenturyTel have had ample notice of the Commission's intention to issue a clarification order on intermodal porting. Indeed, in the past year, USTA has been in to meet with Commission staff and lobby its position on the intermodal porting issue over 20 times.[21] Thus, claims by Petitioners that they were "severely constrained" in their ability to propose solutions to the technical and regulatory issues associated with intermodal portability are completely disingenuous.

No court would find the Petitioners' arguments persuasive. While they suggest that the Commission imposed new location portability obligations on the rural carriers without an opportunity for notice and comment, it is plain that USTA and rural ILECs had both actual and administrative notice of their porting obligations. They commented extensively on CTIA's petition for clarification of ILEC intermodal porting requirements. The Commission simply did not impose any new requirements.[22]

II. ILECS WILL NOT SUFFER ANY COGNIZABLE HARM AS A RESULT OF WIRELINE-TO-WIRELESS PORTING.

The Petitioners contend that they will suffer irreparable harm "because they will face and unfair fight" and lose customers.[23] According to the Petitioners, "a stay will simply leave wireline and wireless providers with symmetrical number portability requirements; wireless carriers will be

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[21] *See, e.g.*, *Ex Parte* of United States Telecom Association, CC Docket No. 95-116 (filed May 1, 2003) (explaining USTA's policy toward intermodal and wireless-to-wireless porting); *Ex Parte* of United States Telecom Association, CC Docket No. 95-116 (filed May 9, 2003) (explaining the "rating and routing difficulties" of porting outside of rate centers); *Ex Parte* of United States Telecom Association, CC Docket No. 95-116 (filed Oct. 1, 2003) (explaining USTA's position that a rulemaking is required for any changes to be made to the Commission's inter-modal porting rules).

[22] This is not a case where the Commission imposed substantive changes to prior regulations or new LNP rules. There is a distinction between rulemaking and a clarification of an existing rule. As the D.C. Circuit has explained, "a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements." *See Sprint Corp. v. FCC*, 315 F. 3d 369 (D.C. Cir. 2003).

[23] Petition at 14.

at no disadvantage."[24] Nextel strongly disagrees with this assertion. The main public benefit of the LNP obligation is its linkage to the promise of full intermodal competition. Taking that away and leaving behind a wireless-to-wireless number porting regime would represent an enormous step backwards in Commission competition policy.

The Petitioners ignore the fact that fundamental purpose behind the intermodal porting obligation is to encourage wireless as a true competitive alternative to landline local service. Indeed, the Commission has explained that: "[w]e require cellular, broadband PCS, and covered specialized mobile radio (SMR) providers . . .which are the CMRS providers that are expected to compete in the local exchange market, to offer number portability. This mandate is in the public interest because it will promote competition among cellular, broadband PCS, and covered SMR carriers, as well as among CMRS and wireline providers."[25] And, as Chairman Powell recently observed when asked about complaints from some ILECs that the LNP rules were not fair: "The only people who are unhappy about local number portability are the people who are afraid to compete for customers, who will now be able to more smoothly move across providers. We believe that the rules are fair. You can move from wireless and wireless and wireline to wireless under most circumstances."[26]

The fear of competition from parties accustomed to being sheltered by regulatory protections is simply insufficient to demonstrate irreparable harm under the Commission's stay criteria. As the courts have concluded, a claim of competitive harm is merely a type of economic loss, and thus "revenues and customers lost to competition which can be regained through

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[24] *Id.* at 15.

[25] *LNP First Report and Order*, 11 FCC Rcd at ¶ 155.

[26] *See* COMM. DAILY, November 19, 2003, at 1.

competition are not irreparable."[27] Thus, the "mere existence of competition is not irreparable harm."[28] Moreover, the Commission has clarified that wireline carriers operating within the 100 largest MSAs (or outside the 100 largest MSAs, after the transition period) may file petitions for waiver of their obligation to port numbers to wireless carriers if they can provide substantial, credible evidence that there are special circumstances that warrant departure from existing rules.[29] This waiver opportunity negates any claims of "irreparable harm."[30] On this basis as well the Petitioners' stay request must be denied.

III. GRANT OF A STAY WILL HARM BOTH CMRS CARRIERS AND THE PUBLIC INTEREST.

According to the Petitioners, the *Intermodal Porting Order* will not only harm local exchange carriers, it will also harm consumers because customers will be confused over the fact that they will be able to port their numbers from a wireline carrier to a wireless carrier but not *vice versa*.[31] It is plain, however, that the grant of the stay request would cause CMRS carriers and telecommunications users substantial harm because it would reverse the investment this Commission and wireless carriers collectively have made in making number portability a reality.

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[27] *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir.), *cert. denied*, 474 U.S. 1019 (1985).

[28] *Holiday Tours,* 559 F.2d at 843 n.3

[29] *Intermodal Porting Order* at ¶ 30.

[30] The Commission may waive its rules when good cause is shown. *See Wait Radio v. FCC* , 418 F.2d 1 153 (D.C. Cir. 1969).

[31] Petition at 16. Petitioners also assert that the Commission failed to address certain consumer protection issues, including that consumers will be unable to rely on the E911 system automatically to direct emergency personnel to their location. This is untrue. The Wireless Telecommunications Bureau addressed the implication of the porting interval for E911, clarifying that carriers could use a mixed service approach in completing port requests. Further, the Bureau stated that to the extent that carriers decide to pursue a mixed service approach as they complete port requests, they are "strongly encourage[d] . . . to instruct consumers at the point of sale about the limited emergency services that will be available to them during the porting process. In addition, we anticipate that the industry will, particularly with regard to wireline to wireless ports, further reduce the duration of porting intervals so that the impact on emergency services will be minimized." *See* Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau to John T. Scott, III, Verizon Wireless and Michael Altschul, CTIA, CC Docket No. 95-116, at 3 (rel. July 3, 2003). Thus contrary to Petitioners' claims, this issue has been fully addressed by the Commission.

And, to address Petitioners' concerns, the Commission initiated a rulemaking to address certain concerns associated with wireless-to-wireline porting, so that customers may undertake to change carriers in this manner in the future.

In addition, the Petitioners claim that consumers will be harmed because "there is no established method for routing and billing calls that have been ported out of the local exchange."[32] Critically, however, the Commission has determined that its number portability rules do not hinge on how calls will be rated or routed after a port occurs. According to the Commission:

> [A] wireless carrier porting-in a wireline number is required to maintain the number's original rate center designation following the port. *As a result, calls to the ported number will continue to be rated in the same fashion as they were prior to the port.* As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.[33]

Thus, while the Petitioners may have concerns about how wireless calls are rated and routed, the Commission squarely determined that these concerns are more properly raised in other pending proceedings and ILECs remain subject to their 251(b) obligations to port numbers. They simply will not be harmed by their porting obligations because any calls that are ported to a CMRS carrier operating outside of the rural ILECs' calling area will be rated the same. There will be no customer confusion, nor will there be dropped or interrupted calls.[34]

The wireline-to-wireless porting obligation will not harm consumers, but will ensure that they are able to take their telephone numbers with them when changing service providers. Contrary

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[32] Petition at 16. Petitioners also express concerns about the harms associated with rural ILEC LNP implementation and the costs associated therewith to rural consumers. Petition at 16. In the *Intermodal Porting Order*, however, the FCC determined that wireline carriers outside the top 100 MSAs are not required to port numbers to wireless carriers that do not have a point of interconnection or numbering resources in the rate center where the customer's wireline number is provisioned until May 24, 2004. Thus, additional time has been given to rural ILECs to implement intermodal LNP and defray the costs of such implementation.

[33] *Intermodal Porting Order* at ¶ 28 (emphasis added).

[34] *See* Sprint Opposition to Rural Carrier Petition to Stay the Wireless Porting Order, CC Docket No. 95-116 (filed Nov. 12, 2003).

to Petitioners' arguments, a grant of the stay would harm the public, which has been told repeatedly, through the press and by Commission outreach programs, that number portability in the top 100 MSAs will be available by November 24, 2003.

IV. CONCLUSION

The Petition is nothing more than an attempt by the ILECs' to force an unwarranted narrowing or reinterpretation of their intermodal porting obligations. If they cannot avoid the full scope of their obligations, then they seek to make it more unpredictable, difficult and far more expensive for wireless carriers to engage in wireline-to-wireless porting. This Petition is fundamentally at odds with federal law, Commission policy and the interests of wireline customers who have the legal right under the Communications Act to port their numbers should they so desire. As such, the Commission should deny the Petition for Stay.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

/s/ Laura H. Phillips
Laura H. Phillips
Laura S. Gallagher
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209

Its Attorneys

Kent Nakamura
Vice President, Deputy General Counsel – Regulatory
Robert McNamara
Senior Counsel – Regulatory
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

November 20, 2003

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 20th day of November, 2003, a copy of "**NEXTEL COMMUNICATIONS, INC. OPPOSITION TO JOINT PETITION FOR STAY**" was mailed via first class mail to the following:

Lawrence E. Sarjeant Indra Sehdev Chalk Michael T. McMenamin Robin E. Tuttle United States Telecom Association 1401 H Street, N.W., Suite 600 Washington, D.C. 20005 *Counsel for United States Telecom Association*	Michael K. Kellogg Aaron M. Panner Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. 1615 M Street, N.W., Suite 400 Washington, D.C. 20036 *Counsel for CenturyTel, Inc., CenturyTel of Colorado, Inc., and United States Telecom Association*
Stacey W. Goff CenturyTel, Inc. 100 CenturyTel Drive Monroe, Louisiana 712303 *Counsel for CenturyTel, Inc. and CenturyTel of Colorado, Inc.*	

/s/ Cynthia S. Shaw
Cynthia S. Shaw